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# Perkins v. State Respondent's Brief Dckt. 39700

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

MELVIN PERKINS,	)	
	)	No. 39700
Petitioner-Appellant,	)	
	)	Bannock Co. Case No.
vs.	)	CV-2011-3637
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	

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**BRIEF OF RESPONDENT**

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**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF BANNOCK**

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**HONORABLE ROBERT C. NAFTZ**  
District Judge

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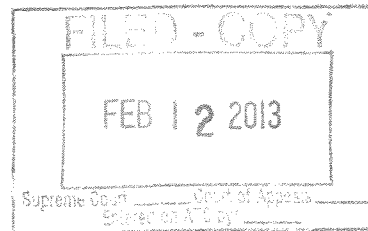
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## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
Nature of the Case .....	1
Statement of Facts and Course of the Proceedings.....	1
ISSUE.....	3
ARGUMENT .....	4
Perkins Has Failed To Establish That The District Court Abused Its Discretion By Denying His Request For The Appointment Of Counsel.....	4
A.    Introduction .....	4
B.    Standard Of Review .....	4
C.    Perkins Has Failed To Show That He Was Entitled To The Appointment Of Post-Conviction Counsel.....	5
CONCLUSION.....	12
CERTIFICATE OF SERVICE .....	12

## **TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE</u></b>
<u>Berg v. State</u> , 131 Idaho 517, 960 P.2d 738 (1998).....	9
<u>Brown v. State</u> , 135 Idaho 676, 23 P.3d 138 (2001) .....	5
<u>Charboneau v. State</u> , 140 Idaho 789, 102 P.3d 1108 (2004).....	4
<u>Dunlap v. State</u> , 141 Idaho 50, 106 P.3d 376 (2004) .....	7
<u>Hust v. State</u> , 147 Idaho 682, 214 P.3d 668 (Ct. App. 2009) .....	4, 5
<u>Lint v. State</u> , 145 Idaho 472, 180 P.3d 511 (Ct. App. 2008).....	7
<u>State v. Colyer</u> , 98 Idaho 32, 557 P.2d 626 (1976) .....	7
<u>State v. Heredia</u> , 144 Idaho 95, 156 P.3d 1193 (2007).....	7
<u>State v. Jafek</u> , 141 Idaho 71, 106 P.3d 397 (2005).....	9
<u>State v. Perkins</u> , Docket No. 38551, 2011 Unpublished Opinion No. 589 (Idaho App., August 23, 2011) .....	1
<u>Swader v. State</u> , 143 Idaho 651, 152 P.3d 12 (2007) .....	4
<u>Workman v. State</u> , 144 Idaho 518, 164 P.3d 798 (2007) .....	5, 7
 <b><u>STATUTES</u></b>	
I.C. § 19-4904 .....	4, 5

## STATEMENT OF THE CASE

### Nature of the Case

Melvin Dewayne Perkins appeals from the summary dismissal of his petition for post-conviction relief. Specifically, Perkins challenges the district court's denial of his request for appointment of counsel.

### Statement of Facts and Course of the Proceedings

Perkins pled guilty to injury to child and the district court sentenced him to a unified sentence of seven years with the first two years fixed. State v. Perkins, Docket No. 38551, 2011 Unpublished Opinion No. 589 (Idaho App., August 23, 2011). Perkins filed a Rule 35 motion seeking leniency in his sentence. Id. The district court denied Perkins' motion. Id. The Court of Appeals affirmed the order denying Perkins' Rule 35 motion, finding the district court correctly denied the motion based on Perkins' failure to provide any new information supporting his request for a reduction of his sentence. Id.

Perkins filed a *pro se* petition for post-conviction relief alleging he had received an illegal sentence, his 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Amendment rights had been violated, the state had violated the plea agreement, and his counsel was ineffective for failing "to hold the Prosecutors [sic] office accountable for a written Plea Agreement" and for failing to file a Rule 35 motion and a direct appeal. (R., pp.2-3.) Perkins sought relief in the form of a new sentence or the opportunity to withdraw his guilty plea. (R., p.3.) Perkins also filed a motion and affidavit in support requesting the appointment of counsel. (R., pp.16-19.) The state filed an answer, asserting the petition failed to state any grounds upon which relief

could be granted, the claims should have been raised on direct appeal, and the petition contained bare and conclusory allegations unsubstantiated by admissible evidence. (R., pp.31-36.) The state also sought dismissal of the petition for post-conviction relief. (R., p.34.) The district court filed a notice of intent to dismiss the petition. (R., pp.37-57.) It first considered and denied Perkins' request for counsel in his post-conviction proceeding, finding because Perkins' claims were frivolous and he "did not allege facts raising even the possibility of a valid claim," Perkins was not entitled to the appointment of counsel. (R., p.41.) Perkins filed a response to the notice of intent to dismiss and supported it with transcripts, written communication with his attorney, and argument. (R., pp.72-92.) The district court dismissed the petition for post-conviction relief, finding Perkins was not entitled to relief as a matter of law. (R., pp.93-102.)

Perkins timely appealed. (R., pp.103-108.)

## ISSUE

Perkins states the issue on appeal as:

Did the district court err when it denied Mr. Perkins' motion for appointment of post-conviction counsel?

(Appellant's brief, p.3.)

The state rephrases the issues on appeal as:

Has Perkins failed to show error in the district court's denial of post-conviction counsel?

## ARGUMENT

### Perkins Has Failed To Establish That The District Court Abused Its Discretion By Denying His Request For The Appointment Of Counsel

#### A. Introduction

Perkins asserts on appeal that the court erred in denying his request for post-conviction counsel filed contemporaneously with his *pro se* petition for post-conviction relief. (Appellant's brief, p.4.) Because Perkins failed to raise any potentially valid claims in his petition for post-conviction relief, Perkins' argument fails.

#### B. Standard Of Review

A request for appointment of counsel in a post-conviction proceeding is governed by I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); Hust v. State, 147 Idaho 682, 683, 214 P.3d 668, 669 (Ct. App. 2009). The court's discretion is not unfettered, however. If the petitioner qualifies financially and "alleges facts showing the possibility of a valid claim that would require further investigation on the defendant's behalf," the court must appoint post-conviction counsel to assist the petitioner in developing his or her claims. Swader v. State, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007); Charboneau, 140 Idaho at 793, 102 P.3d at 1112. If, on the other hand, the claims in the petition are so patently frivolous that there appears no possibility that they could be developed into a viable claim even with



the assistance of counsel and further investigation, the court may deny the request for counsel and proceed with the usual procedure for dismissing meritless post-conviction petitions. Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007); Hust v. State, 147 Idaho 682, 684, 214 P.3d 668, 670 (Ct. App. 2009).

When a motion for the appointment of counsel is presented, the abuse of discretion standard as applied to I.C. § 19-4904 “permits the trial court to determine whether the facts alleged are such that they justify the appointment of counsel; and, in determining whether to do so, every inference must run in the petitioner’s favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts.” Charboneau, 140 Idaho at 793-94, 102 P.3d at 1112-13. In reviewing the denial of a motion for appointment of counsel in post-conviction proceedings, “[t]his Court will not set aside the trial court’s findings of fact unless they are clearly erroneous. As to questions of law, this Court exercises free review.” Brown v. State, 135 Idaho 676, 678, 23 P.3d 138, 140 (2001), quoted in Charboneau, 140 Idaho at 792, 102 P.3d at 1111.

C. Perkins Has Failed To Show That He Was Entitled To The Appointment Of Post-Conviction Counsel

Perkins asserts the district court erred in denying his motion for the appointment of post-conviction counsel because, he contends, his petition “contained sufficient allegations that, at a minimum, raised the possibility of two valid claims.” (R., p.8.) Specifically, Perkins argues that counsel should have

been appointed to represent him in his claims that he received ineffective assistance of counsel when “counsel failed to object to the State’s breach of the plea agreement,” and when “counsel failed to file a Notice of Appeal.” (Id.) The district court correctly reviewed Perkins’ petition for post-conviction relief “to determine whether the facts alleged justify the appointment of counsel” and ultimately concluded Perkins’ allegations were frivolous and he “did not allege facts raising even the possibility of a valid claim.” (R., p.41.)

In his *pro se* petition for post-conviction relief, Perkins claimed his trial counsel was ineffective for failing “to hold the Prosecutors [sic] office accountable for a written Plea Agreement” where Perkins signed such agreement with the belief that he would “only Receive Probation.” (R., p.3 (capitalization original).) Perkins requested he be granted relief in the form of either an amended sentence (“I would like to be granted my withheld judgement [sic] and the Probation i [sic] agreed to”) or the ability to withdraw his guilty plea. (R., p.3 (capitalization original).) To support his position, Perkins included an affidavit stating he pled guilty to the charge of injury to child because his attorney advised him to and because he “was suppose[d] to get probation only and not a day served in jail.” (R., p.6.) The district court, in denying his motion for post-conviction counsel, interpreted Perkins’ argument to be an assertion that his guilty plea was not entered voluntarily. (R., pp.50-53.) The district court looked to Perkins’ affidavit supporting his petition for post-conviction relief wherein Perkins complained:

I spoke with Mr. Marler on several occasions, During one of the visits with Mr. Marler he informed me that the State was going

to offer me a plea agreement if i plead guilty. I asked about the conditions of the plea bargain and he stated if i plead guilty to injury to a child the State would offer me a withheld judgement and probation. The only Reason i Plead [sic] guilty to these charges that i'm in Prison for that my attorney advised me too. because I was suppose to get probation only and not a day served in jail, other then that i would have went to trial on all charges.

(R., p.6 (verbatim).)

“The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Lint v. State, 145 Idaho 472, 481, 180 P.3d 511, 520 (Ct. App. 2008) (citing Dunlap v. State, 141 Idaho 50, 60, 106 P.3d 376, 386 (2004)). “For a guilty plea to be valid, the entire record must demonstrate that the plea was entered into in a voluntary, knowing, and intelligent manner.” Workman v. State, 144 Idaho 518, 527, 164 P.3d 798, 807 (2007) (citing State v. Heredia, 144 Idaho 95, 96, 156 P.3d 1193, 1194 (2007)). Determining whether a plea is voluntary involves three inquiries: “(1) whether the defendant’s plea was voluntary in the sense that he understood the nature of the charges and was not coerced; (2) whether the defendant knowingly and intelligently waived his rights to a jury trial; and (3) whether the defendant understood the consequences of pleading guilty.” Id. (citing State v. Colyer, 98 Idaho 32, 34, 557 P.2d 626, 628 (1976)). In examining the record, the district court concluded Perkins’ plea was voluntarily entered:

The record in this case indicates the Petitioner entered a voluntary, knowing, and intelligent guilty plea. Mr. Perkins submitted a signed and completed Guilty Questionnaire wherein he acknowledged that he understood all of the questions on the form and that his answers were true and correct. The Petitioner indicated he was not under the influence of any kind of alcohol,

drugs, or medication. He also indicated that he “had enough time to discuss all of the ramifications” of his case with his attorney. He acknowledged he had “fully discussed all facts and circumstances surround the charges” against him with his attorney. Mr. Perkins also admitted his attorney had “discussed fully” the “possible consequences” of a guilty plea. Mr. Perkins further indicated that he was “satisfied” with his attorney’s services and that he felt he had “been adequately and competently represented” by his attorney. The Petitioner also acknowledged that he “realize[d] he “may be imprisoned in the State Penitentiary” for his crime and he understood that his sentence “may be imposed with no right to probation or parole”. Also significant was the Petitioner’s recognition that no person had threatened him or done anything to make him enter his plea against his will. Mr. Perkins further indicated he had not been promised any special sentence, reward, favorable treatment, or leniency with regard to his plea. The Petitioner acknowledged that the “only person who can promise what sentence” he would actually receive was the judge. The Petitioner also signified he had answered all of the questions truthfully and of his own free will. Furthermore, the plea agreement signed by Mr. Perkins clearly stated it was “not intended by the parties to be binding on the Court.”

(R., pp.52-53 (citations to the record omitted).) The district court conditionally denied Perkins’ request for counsel after concluding Perkins’ claim that his plea was not voluntarily made was frivolous, but it gave Perkins the required 20 days to support his arguments presented in his petition for post-conviction relief. (See, generally, R., pp.37-57 (Notice of Intent to Dismiss).)

Perkins filed a response to the district court’s notice of intent to dismiss, focusing on his assertion that the plea agreement was breached and including written correspondence between Perkins and his trial counsel and transcripts from plea and sentencing hearings. (R., pp.58-92.) Although Perkins asserts on appeal the district court “never analyzed the claim that his attorney was ineffective for failing to object to the breach” (Appellant’s brief, p.9), the court did address the question of the alleged breach of the plea agreement by the state.

In its order dismissing Perkins' petition for post-conviction relief, the district court found Perkins failed to present additional evidence that would support his assertions that the state breached the plea agreement and that his attorney was ineffective for failing to object to such breach. (R., pp.95-96.) The court found it was actually Perkins who breached the plea agreement by failing to appear for his original sentencing date almost six years before sentence was finally imposed:

At that time [after Perkins entered his plea] the court set the matter for sentencing and confirmed the date with the [sic] Mr. Perkins. On November 29, 2004, Mr. Perkins did not appear for his sentencing. In fact, his attorney explained that he had tried to reach him by phone but was not successful. As a result of Mr. Perkins['] failure to appear for sentencing the court issued a bench warrant for his arrest. Mr. Perkins breached the plea agreement by not appearing for sentencing therefore negating any obligation the state had to make any recommendations for sentencing based upon the terms of the plea agreement. By the time Mr. Perkins was arrested and brought back in front of the court in September of 2010, the state was no longer required to make any sentencing recommendations pursuant to the plea agreement because of the Petitioner's breach of that agreement.

(R., pp.98-99 (record citations omitted).)

Implicit in a plea agreement is the defendant's appearance at sentencing.

Berg v. State, 131 Idaho 517, 519, 960 P.2d 738, 740 (1998). A failure to appear will constitute a breach of the agreement by the defendant:

In essence, part of pleading guilty pursuant to a plea agreement, is receiving the benefits of the agreement at sentencing for the crime to which the defendant has admitted guilt. Generally a defendant cannot receive a sentence unless he attends the sentencing hearing and consequently, failing to attend sentencing constitutes a breach of the plea agreement by the defendant.

State v. Jafek, 141 Idaho 71, 74, 106 P.3d 397, 399 (2005). The district court correctly found Perkins himself had violated the plea agreement and was not

“entitled to any relief as a matter of law.” (R., p.101.) Because the additional information Perkins provided the district court in support of his claim that his trial counsel was ineffective for failing to object to the state’s breach of the plea agreement actually showed Perkins’ own breach, the record supports the court’s original finding that this claim was frivolous and the court did not err in denying Perkins’ request for post-conviction counsel.

Perkins also contends on appeal that his motion for post-conviction counsel was improperly denied because his *pro se* petition raised a viable claim of ineffective assistance of counsel for failing to file a Rule 35 motion or a direct appeal. (Appellant’s brief, pp.12-13.) In his petition, Perkins made a blanket, unsupported statement that his attorney “failed to file [his] Rule 35 and [his] Direct Appeal.” (R., p.3.) This claim is not addressed in any of the materials accompanying Perkins’ petition. In finding this claim frivolous and denying Perkins’ request for counsel, the district court found:

The Petitioner alleged that his attorney was ineffective because he “failed to file my Rule 35 and my Direct Appeal.” However, other than this bare statement, Mr. Perkins does not offer any other argument or statement in support. Mr. Perkins does not allege or present evidence that he actually requested his attorney file an appeal or that his attorney failed to comply with such request. Mr. Perkins did not even address this allegation in his supporting affidavit. Furthermore, Mr. Perkins did file a motion for reduction of his sentence under Rule 35, which motion was denied by the district court and the appellate court. Therefore, as the Petitioner has not presented any evidence, or even asserted, that he communicated his desire to appeal to his counsel or that his counsel understood he had made such a request, the Petitioner has not stated a claim upon which relief can be granted.

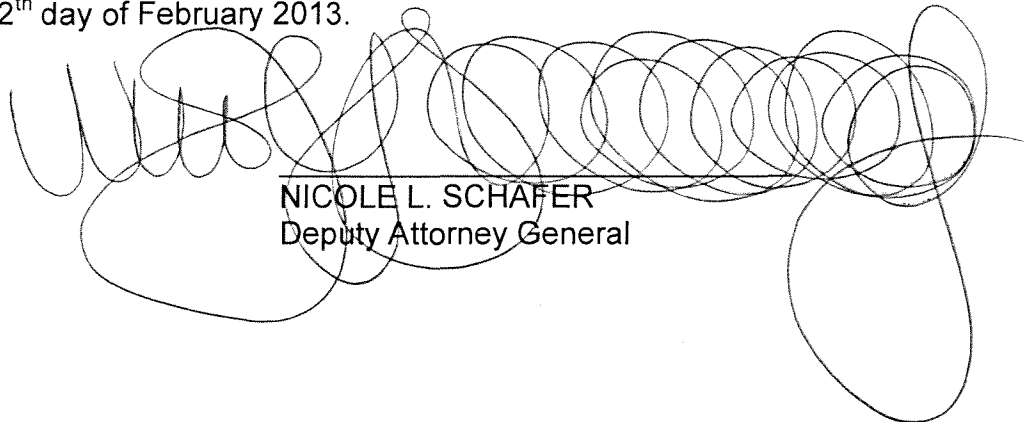
(R., pp.54-55 (record citation omitted).) In his response to the district court’s notice of intent to dismiss, Perkins once again failed to even address this claim.

On appeal, Perkins appears to argue that by merely alleging his counsel was ineffective for failing to file a Rule 35 motion or an appeal, Perkins is entitled to an inference that “he either instructed his attorney to file a Notice of Appeal or that his attorney was ineffective in failing to consult with him regarding whether to file a Notice of Appeal.” (Appellant’s brief, pp.12-13.) However, Perkins provides no support for this position except citing to ABA Guidelines advising that a defense attorney has obligations to advise defendants of appellate rights. (Appellant’s brief, p.13, n.4.) It does not logically follow from Perkins’ bare statement “my Attorney failed to file my Rule 35 and my Direct Appeal” that Perkins necessarily asked his attorney to file on his behalf or that his attorney failed to consult with him. The district court did not err in finding Perkins’ claim of ineffective assistance of counsel for failing to file a Rule 35 motion or an appeal invalid and not entitling Perkins to the appointment of counsel.

CONCLUSION

The state respectfully requests this Court uphold the district court's denial of Perkins' request for post-conviction counsel.

DATED this 12<sup>th</sup> day of February 2013.



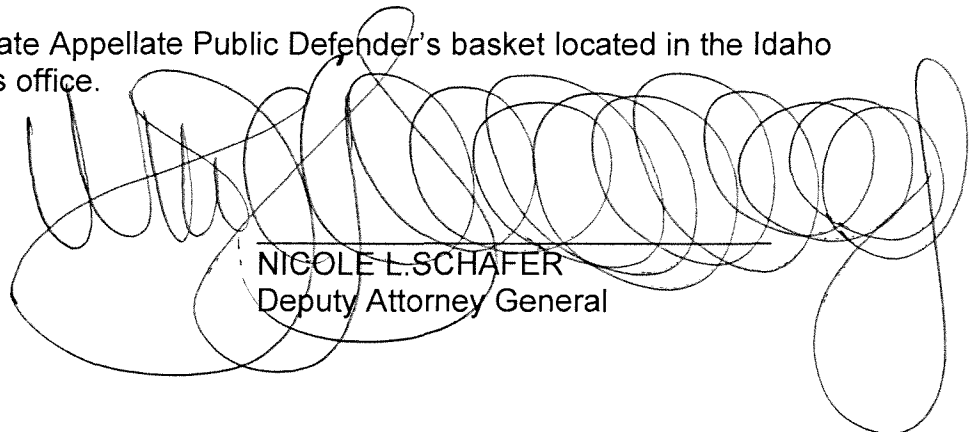
NICOLE L. SCHAFER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 12<sup>th</sup> day of February 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SPENCER J. HAHN  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



NICOLE L. SCHAFER  
Deputy Attorney General

NLS/pm